

hotel reservations, and banks. In fact, there is no such agreed-upon system in place today.

This is perhaps the most telling aspect of the case. BellSouth made no effort to separate out ISP traffic from its own bills until the May-June 1997 time frame. WorldCom argues in its brief that BellSouth's "lack of action is especially glaring given Mr. Hendrix's acknowledgment that there are transport and termination costs associated with calls terminating at an ISP." Prior to that time, BellSouth may have paid some reciprocal compensation for ISP traffic. Witness Hendrix admitted, "We may have paid some, I will not sit here and say that we did not pay any." The other parties made no effort to separate out ISP traffic, and based on their position that the traffic should be treated as local, this is as one would expect. In some cases the contracts were entered into more than a year before this time period.

It appears from the record that there was little, if any, billing of reciprocal compensation by the ALECs until just before BellSouth began to investigate the matter. It was the receipt of the bills for considerable amounts of reciprocal compensation that triggered BellSouth's investigation of the matter, and its decision to begin removing ISP traffic from its own bills. If these large bills were never received, would BellSouth have continued to bill the ALECs for reciprocal compensation on ISP traffic? There would have been no reason for BellSouth to investigate, and therefore no reason for them to start separating their own traffic. Under the circumstances, we have difficulty concluding that the parties all knew that ISP traffic was interstate, and should be separated out before billing for reciprocal compensation on local traffic, as BellSouth contends.

#### Impact on Competition

The potential impact of BellSouth's actions on local competition is perhaps the most egregious aspect of the case. As witness Hendrix testified, The Telecommunications Act of 1996 "established a reciprocal compensation mechanism to encourage local competition." He argued that "The payment of reciprocal compensation for ISP traffic would impede local competition." We are more concerned with the adverse effect that BellSouth's refusal to pay reciprocal compensation could have on competition. We agree with this assessment by TCG witness Kouroupas:

As competition grows, the smaller, leaner ALECs may well win other market segments from ILECs. If each time this occurs the ILEC, with its greater resources overall, is able to fabricate a dispute with ALECs out of whole cloth and thus invoke costly regulatory processes, local competition could be stymied for many years.

### Conclusion

We think the question of whether ISP traffic is local or interstate can be argued both ways. While it appears that the FCC may believe Internet usage is an interstate service, it also appears that it believes that it is not a telecommunications service. The FCC itself seems to be leaning toward the notion of severability of the information service portion of an Internet call from the telecommunications portion, which is often a local call.

Further, the FCC has allowed ISPs to purchase local service for provision of Internet services, without ever ruling on the extent to which the "local" characterization should apply. Indeed, as recently as April, 1998, the FCC itself indicated that a decision has not been made as to whether or not reciprocal compensation should apply. Thus, while there is some room for interpretation, we believe the current law weighs in favor of treating the traffic as local, regardless of jurisdiction, for purposes of the Interconnection Agreement. We also believe that the language of the Agreement itself supports this view. We therefore conclude on the basis of the plain language of the Agreement and of the effective law at the time the Agreement was executed, that the parties intended that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls; else one would expect the definition of local calls in the Agreement to set out an explicit exception.

Even if we assume for the sake of discussion that the parties' agreements concerning reciprocal compensation can be said to be ambiguous or susceptible of different meanings, the parties' conduct at the time of, and subsequent to, the execution of the Agreement indicates that they intended to treat ISP traffic as local traffic. None of the parties singled ISP traffic out for special treatment during their negotiations. BellSouth concedes that it rates the traffic of its own ISP customers as local traffic. It would hardly be just for BellSouth to conduct itself in this way while treating WorldCom differently. Moreover, BellSouth made no attempt to separate out ISP traffic from its

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bills to the ALECs until it decided it did not want to pay reciprocal compensation for ISP traffic to the ALECS. BellSouth's conduct subsequent to the Agreement was for a long time consistent with the interpretation of Section 1.40 urged by WorldCom. A party to a contract cannot be permitted to impose unilaterally a different meaning than the one shared by the parties at the time of execution when it later becomes enlightened or discovers an unintended consequence.

BellSouth states in its brief that "the Commission must consider the extant FCC orders, case law, and trade usage at the time the parties negotiated and executed the Agreements." We have. By its own standards, BellSouth is found wanting. The preponderance of the evidence shows that BellSouth is required to pay WorldCom reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to WorldCom for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the WorldCom and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate WorldCom according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

#### **The Teleport/TCG South Florida-BellSouth Agreement**

Local traffic is defined in Section 1.D. of the Agreement between BellSouth and TCG as:

any telephone call that originates and terminates in the same LATA and is billed by the originating party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection arrangement with an independent LEC, with which TCG is not directly interconnected.

This Agreement was entered into by the parties on July 15, 1996, and was subsequently approved by the Commission in Docket No. 960862-TP. Under TCG's prior Agreement with BellSouth, ISP traffic was treated as local.

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The TCG Agreement states in Section IV.B and part of I.C:

The delivery of local traffic between parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement.

Each party will pay the other for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, incorporated herein by this reference.

No exceptions have been made to the definition of local traffic to exclude ISP traffic. The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay TCG reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to TCP for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the TCG and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate TCG according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

#### **The MCI-BellSouth Agreement**

The Agreement between MCI and BellSouth defines local traffic in Attachment IV, Subsection 2.2.1. That subsection reads as follows:

The parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in this Agreement and the Order of the FPSC. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area (EAS) exchange. The terms Exchange and EAS exchanges are defined and specified in Section

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A3 of BellSouth's General Subscriber Service  
Tariff.

MCI witness Martinez testified that no exception to the definition of local traffic was suggested by BellSouth. MCI argues in its brief that "[i]f BellSouth wanted a particular exception to the general definition of local traffic, it had an obligation to raise it."

The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay MCI reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to MCI for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the MCI and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate MCI according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

**The Intermedia-BellSouth Agreement**

The Agreement with Intermedia defines Local Traffic in Section 1(D) as:

any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff. (TR 142-143)

The portion regarding reciprocal compensation, Section IV(A) states:

The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. (TR 143)

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Section IV(B) states:

Each party will pay the other party for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein.

The evidence shows that no exceptions were made to the definition of local traffic to exclude ISP traffic in the Intermedia-BellSouth Agreement. The facts surrounding this Agreement, and the arguments made by the parties, are essentially the same as the WorldCom Agreement, and we will not reiterate them here. Our decision is the same. The preponderance of the evidence shows that BellSouth is required to pay Intermedia reciprocal compensation for the transport and termination of telephone exchange service local traffic that is handed off by BellSouth to Intermedia for termination with telephone exchange service end users that are Internet Service Providers or Enhanced Service Providers under the terms of the Intermedia and BellSouth Florida Partial Interconnection Agreement. Traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic. We find that BellSouth must compensate Intermedia according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that under the terms of the parties' Interconnection Agreements, BellSouth Telecommunications, Inc. is required to pay Worldcom Technologies, Inc., Teleport Communications Group Inc./TCG South Florida, Intermedia Communications, Inc., and MCI Metro Access Transmission Services, Inc., reciprocal compensation for the transport and termination of telephone exchange service that is terminated with end users that are Internet Service Providers or Enhanced Service Providers. BellSouth Telecommunications, Inc. must compensate the complainants according to the interconnection agreements, including interest, for the entire period the balance owed is outstanding. It is further

ORDERED that these dockets shall be closed.

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By ORDER of the Florida Public Service Commission this 15th  
Day of September, 1998.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

This is a facsimile copy. A signed  
copy of the order may be obtained by  
calling 1-850-413-6770.

( S E A L )

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

5

<b>Teleport Communications Group Inc.</b>	:	
<b>vs.</b>	:	
<b>Illinois Bell Telephone Company</b>	:	
<b>Ameritech Illinois</b>	:	
<b>Complaint as to dispute over a contract</b>	:	<b>97-0404</b>
<b>definition.</b>	:	
<b>WorldCom Technologies, Inc.</b>	:	
<b>successor in interest to MFS Intelenet of</b>	:	
<b>Illinois, Inc.</b>	:	
<b>-vs-</b>	:	
<b>Illinois Bell Telephone Company d/b/a</b>	:	
<b>Ameritech Illinois</b>	:	
<b>Complaint as to Respondent's failure to</b>	:	<b>97-0519</b>
<b>pay Complainant reciprocal compensation</b>	:	
<b>for local calls which originate on Respon-</b>	:	
<b>dent's network and terminate on</b>	:	
<b>Complainant's network.</b>	:	
<b>MCI Telecommunications Corporation and</b>	:	
<b>MCIMetro Access Transmission Services,</b>	:	
<b>Inc.,</b>	:	
<b>-vs-</b>	:	<b>97-0525</b>
<b>Illinois Bell Telephone Company, d/b/a</b>	:	<b>Consolidated</b>
<b>Ameritech Illinois</b>	:	
<b>Complaint as to Respondent's refusal to</b>	:	
<b>pay reciprocal compensation to</b>	:	
<b>Complainant for local traffic terminated by</b>	:	
<b>Complainant to its Internet service provider</b>	:	
<b>customers.</b>	:	

**ORDER**

By the Commission:

**I. INTRODUCTION**

On September 8, 1997, Teleport Communications Group, Inc. ("TCG") filed a Complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech" or "Ameritech Illinois"). In its Complaint, TCG alleged that Ameritech Illinois had violated the terms of its interconnection agreement with TCG as approved by the Commission's order in Docket 96-AA-002. Specifically, TCG complained that Ameritech Illinois had refused to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Information Service Providers ("ISPs") on TCG's network in violation of Section 5.6.1 of its interconnection agreement. TCG requested that the Commission issue an order finding: (1) that the term "Local Traffic" as used in the interconnection agreement with Ameritech Illinois includes local calls terminated to ISPs subscribing to local exchange service from TCG; (2) that all such traffic is subject to reciprocal compensation, in the same manner as all other local calls from an Ameritech Illinois local exchange customer to a TCG local exchange customer; (3) that Ameritech Illinois is obligated to pay TCG for all ISP traffic delivered to it, including traffic delivered before the filing of its Complaint for which Ameritech Illinois has refused payment, together with interest on all amounts owed and unpaid; and (4) that Ameritech Illinois be reprimanded for anticompetitive and unilateral withholding of monies owed to TCG.

On October 9 and 10, WorldCom Technologies, Inc. ("WorldCom") and MCI Telecommunications Corp. and MCI Metro Access Transmission Services, Inc. (collectively "MCI"), respectively, filed complaints against Ameritech Illinois alleging similar violations of their interconnection agreements and requesting relief similar to that which TCG requested. WorldCom and MCI, respectively, filed motions to consolidate Dockets 97-0404, 97-0519, and 97-0525. On November 4, 1997, the Hearing Examiner, on his own motion, consolidated the three dockets.

Petitions to intervene were filed by AT&T Communications of Illinois, Inc. and Focal Communications Corporation of Illinois ("Focal") in Docket 97-0404. America Online, Inc. and Consolidated Communications, Inc. filed petitions to intervene in all three dockets. All petitions to intervene were granted by the Hearing Examiner.

Pursuant to notice as required by law and the rules of the Commission, a prehearing conference, status hearing and evidentiary hearing were held before the duly authorized Hearing Examiner in Chicago, Illinois on September 25, 1997, October 9, 1997 and November 21, 1997, respectively. At the evidentiary hearing on November 21, 1997, TCG presented the direct and rebuttal testimony of William Page Montgomery, founder and principal of Montgomery Consulting. WorldCom presented

argument, they contended that, when the call reaches the telephone exchange service purchased by the ISP and to which the called telephone number is assigned, the call is terminated. Third, they further argued that treating calls to ISPs as local calls is consistent with the definition of local traffic contained in the interconnection agreements that they have with Ameritech Illinois. Section 5.8.1 of the WorldCom MFS agreement, for example, provides that:

"Reciprocal compensation applies for transport and termination of Local Traffic billable by Ameritech Illinois or MFS which a Telephone Exchange Service Customer originates on Ameritech's or MFS' network for termination on the other Party's network."

"Reciprocal Compensation" is defined in Section 1.51:

"As described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Telecommunications originating on one Party's network and terminating on the other Party's network."

"Local traffic" is defined in Section 1.38 of the Agreement as:

"a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; provided, that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated." (WorldCom Ex. 1.0, pp. 12-13).

In addition, the interconnection agreement between TCG and Ameritech defines local traffic as "local service calls as defined by the Commission." TCG Ex. 7 at 5. Based on these sections the CLECs contend that the agreements' reciprocal compensation provisions apply to local traffic terminated to an ISP. Mr. Montgomery further contended that Ameritech Illinois knew early on that the CLECs intended to market to ISPs. Several of the CLECs also contended that Ameritech Illinois simply regretted its prior position supporting reciprocal compensation, rather than "bill and keep". Fourth, the CLECs argued that calls to ISPs are routed to them over local interconnection trunks and, therefore, that this traffic must be local traffic.

Finally, the CLECs noted that other state commissions and the FCC have determined that traffic terminating to an ISP is local, and that this Commission should reach the same conclusion in this proceeding. Mr. Montgomery states that "[u]nder the FCC rules, ISPs are not carriers subject to the access charge rules." (TCG Ex. 10, p. 12). Mr. Montgomery further contended that what is sometimes referred to as the

to Enhanced Service Providers. Notice of Proposed Rulemaking FCC Rcd 4305 (1987). After intense lobbying by the ISP industry, however, Mr. Panfil stated that the FCC reluctantly concluded that the time was not yet right to correct the disparity.

Ameritech acknowledged that, in its 1996 access charge reform order, the FCC once again declined to impose carrier access charges on ISPs. In re Access Charge Reform, CC Docket Nos. 96-262 et al., 11344-48 (released May 16, 1997). However, at the same time, the FCC instituted a new proceeding to address the implications of information services more broadly, with the intention of developing proposals that the FCC contended would be "sensitive to the complex economic, technical and legal questions raised in this area". Notice of Inquiry. Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket 96-202 (released Dec. 24, 1996).

Mr. Panfil further explained that the FCC is currently addressing precisely the same issue raised by the CLECs in this case in a proceeding initiated by the ALTS. In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CBD 97-30 (11ALTS Docket"). ALTS has requested an expedited FCC ruling that "calls to an Information Service Provider made from within a local calling area must be treated as local calls by any and all LECs involved in carrying those calls." Mr. Panfil stated that Ameritech and all of the Complainants have submitted pleadings in FCC Docket 97-30 which set forth their respective positions. Indeed, Ameritech noted in its Reply Brief that the ALTS request was premised on the FCC's "exclusive jurisdiction". The comment cycle at the FCC is complete, and according to Mr. Panfil, the FCC is expected to issue a ruling within the near future.

Ameritech Illinois also disputed the CLEC's substantive arguments relative to the nature of ISP traffic. First, Mr. Panfil stated that Ameritech Illinois treats calls terminated to ISPs as local calls for billing and rating purposes solely due to the FCC's access charge exemption for ISPs, and that the billing and rating of such calls does not determine whether the call is a local call under state jurisdiction. He further stated that ISP calls are, in fact, interstate calls within the jurisdiction of the FCC. With respect to separations and reporting procedures, Mr. Panfil maintained that these procedures will be reviewed once the FCC has issued its ruling in the ALTS proceeding. He also noted that FGA traffic – which is indisputably access traffic – was also treated initially as local for these purposes.

Mr. Panfil contended that Ameritech Illinois' interconnection agreements with the CLECs do not define ISP calls as local calls. Mr. Panfil argued that, although the FCC has exempted ISPs from paying access charges, it never has considered ISP traffic to be local traffic. In his view, had the FCC concluded that ISP traffic is local traffic, the FCC would not have had the authority to decide whether or not ISPs should be required to pay access charges. Therefore, such calls are exchange access and, therefore, are not subject to the reciprocal compensation provisions in the agreements.

would target customers with high terminating traffic requirements; however, Ameritech Illinois had not assumed the risk that the CLECs would target ISP traffic which has unusually long holding times and demand reciprocal compensation for traffic which is not local traffic in any event.

In the event that this Commission decides to address the issues on their merits now and concludes that some form of compensation is required, Mr. Panfil proposed an interim solution. This solution would apply until either the FCC resolves this issue or an appropriate economic structure is created that allows all carriers to recover their costs. Under his plan, Ameritech Illinois and the CLECs would develop an estimate of the revenues that they currently receive for Internet ISP traffic. The companies could jointly determine what percentage of the switching and transport facilities used for calls terminated to an ISP belong to each company. The percentage factor could then be used to allocate the revenue pool between the companies. This approach, Mr. Panfil stated, would produce equitable results and would avoid creating a situation where one competitor subsidizes another.

In its Initial Brief, Ameritech Illinois contended that the FCC has preemptive jurisdiction over the issues in this proceeding. Ameritech Illinois argued that the FCC has exclusive jurisdiction over interstate traffic and that the FCC must be permitted to clarify its access charge exemption relative to this traffic. It further contended that the doctrine of primary jurisdiction requires that the Commission defer this proceeding and await the FCC's decision before considering the complaints on their merits. Ameritech Illinois noted that the FCC is uniquely suited to interpret its own prior orders; that the ISP traffic issue is not unique to Illinois and requires a single, uniform resolution applicable to all states; that a deferral of action in this case would avoid the risk of inconsistent results between this Commission and the FCC; and that a premature decision here would adversely affect the FCC's performance of its regulatory responsibilities. Finally, Ameritech Illinois argued that principles of comity, non-interference among decision-making bodies and interests of administrative economy justified deferral of action by this Commission.

#### STAFF

Staff took the same position as the CLECs, i.e., that calls terminated to an ISP are local calls subject to reciprocal compensation. Staff contended that distinguishing between end user calls terminated to ISPs and those terminated to other end users, for purposes of reciprocal compensation, would violate the terms of the interconnection agreements between Ameritech Illinois and the CLECs. Staff argued that, because the agreements provide that reciprocal compensation is applicable to "Local Traffic billable by Ameritech," and since Ameritech Illinois currently charges its end users local service charges when completing calls that terminate at the CLECs' ISP customers, withholding reciprocal compensation on those calls would violate the terms of the interconnection agreements.

WorldCom, TCG and MCI also opposed Ameritech's interim compensation proposal. They argued that it was not consistent with the interconnection agreements. TCG further claimed that Internet traffic would be difficult to track and, therefore, that Ameritech Illinois' interim revenue pooling proposal would be difficult to implement.

### **COMMISSION ANALYSIS AND CONCLUSION**

In the present consolidated cases, Complainants have asked this Commission to enforce certain provisions of the Commission-approved interconnection agreements between Ameritech Illinois and the individual complainants. This Commission's jurisdiction under the Public Utilities Act and Section 252 of the Telecommunications Act of 1996 (the "Act") to interpret and enforce the terms of interconnection agreements is not disputed. See Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8th Cir. 1997).

The language of the interconnection agreements define local traffic, define switched access and define reciprocal compensation. The interconnection agreements of MCI and WorldCom define "Local Traffic" as follows:

[A] call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX or as otherwise determined by the [Federal Communications Commission] or Commission for purposes of Reciprocal Compensation; provided, that in no event shall a Local Traffic call be more than fifteen (15) miles as so calculated.

WorldCom Ex. §1.38; MCI Ex. 3.0, Schedule 1.2, at 8. The interconnection agreement of TCG defines Local Traffic as "local service calls as defined by the Commission" TCG Ex. 7, at 5.

The interconnection agreements provide for reciprocal compensation between Ameritech and the CLECs as follows:

Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the CLECs] that a Telephone Exchange Service Customer originates on Ameritech's or [the CLECs] network for termination on the other Party's network. . . .

The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. . . .

WorldCom Ex. 4, §5.8.1, 5.8.3; TCG Ex. 7, ¶ 5.6, at 14; MCI Ex. 3, ¶4.7, at 16.

the Act and the FCC's own decisions. As Staff cogently explained, when an originating end user makes a Feature Group A call and that call is connected to the interexchange carriers' network, there is no dispute that the originating end user uses the interexchange carrier's network to exchange telecommunications traffic with the end user to which the call is terminated. However, when an originating end user calls an ISP provider in order to use the internet, the traffic exchanged after the call is terminated to an ISP is not considered to be telecommunications traffic by the FCC. Instead it is considered to be an information service and that is true regardless of whether the ISP retransmits information received over such calls to or from further interstate or international destinations.

The FCC has concluded that information services are not telecommunications services, and indeed, the Telecommunications Act draws clear distinctions between "telecommunications", "information service", and "exchange access."

As recently as May of 1997 the FCC indicated that it considers internet access as consisting of more than one element:

When a subscriber obtains a connection to an internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.

FCC Joint Board on Universal Service ¶ 789

Based on these critical distinctions the FCC has determined that ISP traffic is not an exchange access service, but rather, ISPs should be treated as "end users."

With respect to Ameritech Illinois' argument that the FCC has exclusive jurisdiction over the question presented here, the FCC has noted that,

"ISPs do pay for their connections to incumbent LEC networks by purchasing service under state tariffs... To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators."

FCC Access Charge Reform Order at ¶ 346

If the FCC had concluded that calls to ISPs are interstate in nature and thus that the connections between incumbent LECs and Internet ISPs were interstate in nature, like those between incumbent LECs and IXCs for purposes of interstate calls, it would have concluded that it has the authority to address those compensation issues. Accordingly, contrary to Ameritech Illinois' suggestions, there is no jurisdictional

the time, we find that Ameritech Illinois' unilateral action of withholding reciprocal compensation payments is wholly inappropriate. By withholding those payments from its local exchange competitors, surely Ameritech Illinois recognizes that it has done nothing to meaningfully address the alleged underrecovery of costs which, if it exists at all, arises primarily from its own rate structure. For more than a year Ameritech Illinois paid reciprocal compensation treating calls to ISPs as local traffic. Rather than withholding payment, Ameritech Illinois could have, and should have, simply petitioned this Commission for a clarification of its obligations under the interconnection agreement.

Indeed, Ameritech Illinois' unilateral "remedy" is so ill-tailored to its perceived problem that it lends substantial credence to the complainants' allegations that Ameritech Illinois' conduct is intentionally anticompetitive. Ameritech Illinois' local exchange competitors are obligated by law to terminate calls made by Ameritech Illinois' customers, they incur costs in order to do so, and they are entitled to be compensated for the use of their equipment and facilities. Significantly, the competitive local exchange carriers can hardly be considered the cause of any additional unrecovered network costs which Ameritech Illinois believes arise from increased internet usage.

Even if the complainants have specifically targeted ISPs in their marketing efforts, that is no more objectionable than if a carrier chooses to target a telemarketing firm, a take-out restaurant or a high usage household. As Focal points out, the market for service to ISPs is a growth market both in terms of new ISP entrants into the market and the growing demand for service from new and existing ISPs. It is therefore a natural target for a new entrant. The record establishes that the complainants, are highly dependent upon reciprocal compensation payments to finance their operations. The evidence suggests that traffic to ISPs can represent in excess of 60% of the new entrants' reciprocal compensation billings to Ameritech Illinois. The withholding of the payments caused and continues to cause complainants serious harm and has resulted in an anticompetitive impact which is contrary to the public interest.

Ameritech Illinois correctly points out that the decisions of other state commissions are not binding, and indeed, we have made an independent evaluation of the evidence presented in this docket. Nevertheless, it is striking that over a dozen states have considered this issue, and without exception all the state commissions have determined that calls to ISP's should be classified as local calls for the purpose of assessing reciprocal compensation. Such agreement among the states concerning a controversial issue is rare. Notably, Ameritech Illinois makes no attempt to distinguish these decisions on the basis of facts or law but merely asserts that the decisions are "wrong". We think that is unlikely, and we join our counterparts in those states which have held that calls to ISPs are local calls and are subject to reciprocal compensation. The complaint is granted.

Ameritech Illinois since it stopped making payments for ISP traffic; such payments shall include interest at the statutory rate for all withheld payments;

- (9) any outstanding pleadings or motions not previously disposed of should be disposed of in a manner consistent with the results herein;
- (10) the Chief Clerk of the Commission should be directed to maintain all information identified as proprietary and data so designated in this proceeding in a manner which will not permit disclosure, dissemination, revelation or reproduction thereof without further order of the Commission.

IT IS THEREFORE ORDERED that the interpretation of the interconnection agreements made in this order shall be effective from the dates of those interconnection agreements and that Ameritech Illinois shall henceforth pay each of the complainants all charges for reciprocal compensation for all calls which are within 15 miles and for that traffic that is billable as local from its customers to ISPs that are the customers of the complainants. Similarly, each competitive local exchange carrier shall pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois.

IT IS FURTHER ORDERED that within five business days of entry of this Order, Ameritech Illinois shall pay each of the competitive local exchange carriers all reciprocal compensation charges which have been withheld, with interest at the statutory rate. To the extent Ameritech Illinois billed the competitive local exchange carriers for reciprocal compensation and then later provided them with credits on their bills for ISP traffic, it shall resubmit bills to the competitive local exchange carriers for the credited amounts.

IT IS FURTHER ORDERED that the Chief Clerk of the Commission shall maintain all information identified as proprietary and data so designated in this proceeding in a manner which will not permit disclosure, dissemination, revelation or reproduction thereof without further Order of the Commission.

IT IS FURTHER ORDERED that any outstanding pleadings or motions which have not previously been disposed of shall be disposed of in a manner consistent with this Order.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

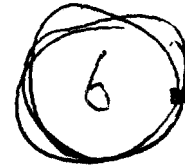
STATE OF MARYLAND



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September 11, 1997

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Swidler & Berlin, Chtd.  
3000 K Street, NW, Suite 300  
Washington, D.C. 20007

Dear Messrs. Hall, Lipman, Rindler, and Ms. Cohn:

This is to advise you that the Commission has reviewed the Complaint against Bell Atlantic-Maryland, Inc. ("BA-MD") for Breach of Interconnection Terms, and Request for Immediate Relief filed on May 22, 1997 by MFS Intelenet of Maryland, Inc. ("MFS"). The Complaint concerns the termination rate for calls to an Internet Service Provider ("ISP").

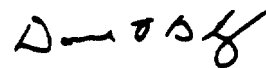
The Commission has reviewed and considered the written comments and the arguments presented at the August 13, 1997 Administrative Meeting. The Commission is of the opinion that the primary issue presented is resolvable pursuant to the terms of the BA-MD/MFS Interconnection Agreement. Further, the Commission finds that MFS is entitled to compensation for termination of the telephone calls in question.

The Commission recognizes that there is a question as to whether these communications are "jurisdictionally interstate communications." See In the Matter of MTS and WATS Market Structure, 97 F.C.C. 2d 682, paragraphs 82-83 (1983). However, it does not believe that this question affects the result herein because of the Federal Communications Commission's ("FCC") requirement that although ISPs use incumbent LEC facilities to originate and terminate interstate calls, these services should be purchased "under the same intrastate tariffs available to end users." In the Matter of Access Charges Reform, FCC 92-158, paragraphs 341-342 (1997). Moreover, we note that this issue is currently being considered by the FCC and may ultimately be resolved by it. In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30. In the event that the FCC issues a decision that requires revision to the directives announced herein, the Commission expects that the parties will so advise it.

David K. Hall, Esq.  
Andrew D. Lipman, Esq.  
Richard M. Rindler, Esq.  
Robin Cohn Esq.  
September 11, 1997  
Page 2

Accordingly, based on the terms of the Agreement, the Commission hereby directs BA-MD to timely forward all future interconnection payments owed MFS for telephone calls placed to an ISP. Additionally, BA-MD shall forward all payments that have been withheld over this dispute to MFS within 15 days of receipt of this letter.

By Direction of the Commission,



Daniel P. Gahagan  
Executive Secretary

jrb

cc: Russell M. Blau, Esq., MFS Intelenet of Maryland, Inc.  
Paul Kouroupas, Esq., Teleport Communications Group  
Michael J. Travieso, Esq., Maryland People's Counsel  
Andrew S. Katz, Esq., Staff Counsel  
Cherie R. Kiser, Esq. and Yaron Dori, Esq. (on behalf of America Online, Inc.)

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

\* \* \* \* \*

In the matter of the application for approval of an )  
interconnection agreement between **BROOKS** )  
**FIBER COMMUNICATIONS OF MICHIGAN,** )  
**INC.,** and Ameritech Information Industry Services )  
on behalf of **AMERITECH MICHIGAN.** )

Case No. U-11178

In the matter of the request by **TCG DETROIT** for )  
clarification or interpretation of its interconnection )  
agreement with **AMERITECH MICHIGAN.** )

Case No. U-11502

In the matter of the complaint of **MFS INTELENET** )  
**OF MICHIGAN, INC.,** against Michigan Bell )  
Telephone Company, d/b/a **AMERITECH** )  
**MICHIGAN,** and request for immediate relief. )

Case No. U-11522

In the matter of the complaint of **BROOKS FIBER** )  
**COMMUNICATIONS OF MICHIGAN, INC.,** )  
against Michigan Bell Telephone Company, d/b/a )  
**AMERITECH MICHIGAN,** and request for )  
immediate relief. )

Case No. U-11553

In the matter of the application of MCI TELE- )  
COMMUNICATIONS CORPORATION for )  
arbitration to establish an interconnection )  
agreement with AMERITECH MICHIGAN. )  
\_\_\_\_\_ )

Case No. U-11554

At the January 28, 1998 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. John G. Strand, Chairman  
Hon. John C. Shea, Commissioner  
Hon. David A. Svanda, Commissioner

### **OPINION AND ORDER**

These consolidated cases involve a dispute about whether Ameritech Michigan owes reciprocal compensation under interconnection agreements with competing providers of basic local exchange service for calls made by customers of Ameritech Michigan to Internet service providers (ISP) that are customers of those other providers. On July 3, 1997, Ameritech Michigan acted unilaterally to withhold reciprocal compensation. As of November 1997, the withheld payments amounted to \$6 million. The Commission concludes that Ameritech Michigan's interconnection agreements require it to pay reciprocal compensation for the disputed calls.

### **Procedural History**

On August 21, 1997, TCG Detroit, Inc., (TCG) filed a request for declaratory ruling and application for resolution of the dispute in Case No. U-11502. It amended its filing on September 22, 1997. On September 18, 1997, MFS Intelenet of Michigan, Inc., (MFS) filed a complaint in Case No. U-11522. On October 7, 1997, MCI Telecommunications Corporation

and MCImetro Access Transmission Services, Inc., (collectively, MCI) filed a motion to compel reciprocal compensation in Case No. U-11554. On October 8, 1997, Brooks Fiber Communications of Michigan, Inc., (Brooks) filed a complaint in Case No. U-11553.<sup>1</sup>

A prehearing conference was held on October 23, 1997 before Administrative Law Judge George Schankler (ALJ). He granted the petition for leave to intervene of AT&T Communications of Michigan, Inc., (AT&T) in Case No. U-11553, consolidated the four cases, and recognized the Commission Staff (Staff) as a participant in all four cases.

On November 17, 1997, the ALJ denied the motion of Ameritech Michigan to compel discovery. On November 19, 1997, Ameritech Michigan filed an application for leave to appeal that ruling. On November 26, 1997, TCG, MCI, Brooks, MFS, and AT&T filed responses.

At a hearing on November 24, 1997, the ALJ granted the petition of BRE Communications, L.L.C., d/b/a Phone Michigan, to intervene in Case No. U-11553. On that same date, TCG, MFS, Brooks, MCI, and the Staff each presented the testimony of one witness, and Ameritech Michigan presented the testimony of two witnesses. Following cross-examination of the witnesses, the record closed. The record consists of 547 pages of transcript and 32 exhibits that the ALJ admitted into evidence.<sup>2</sup>

The parties filed briefs on December 12, 1997 and reply briefs on December 19, 1997. With its initial brief, Ameritech Michigan also filed a motion for a stay. Because the Commis-

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<sup>1</sup>On August 29, 1997, Brooks filed a motion in Case No. U-11178, the docket in which the Commission had approved its interconnection agreement with Ameritech Michigan, to compel payment of reciprocal compensation for ISP calls. Brooks' October 8, 1997 complaint encompasses the issues raised in the motion, which may therefore be dismissed as moot.

<sup>2</sup>The Commission finds it unnecessary to resolve the dispute about admission of Exhibits C-9 through C-14. The exhibits are cumulative and would not affect the Commission's decision.

sion had indicated that it would read the record, the ALJ did not prepare a proposal for decision.

**Leave to Appeal and Request to Take Administrative Notice**

Ameritech Michigan argues that the ALJ improperly denied its motion to compel discovery from the complainants and AT&T. Ameritech Michigan argues that each of the questions is relevant to the issues in the complaints or reasonably calculated to lead to the discovery of relevant evidence. Ameritech Michigan seeks to have the complainants and AT&T (1) identify all of the telecommunication services they provide to ISPs in Michigan, (2) provide copies of all agreements with ISPs related to revenue or expense sharing or reimbursement of costs they incur in terminating ISP traffic, (3) identify all of their ISP customers in Michigan, (4) provide copies of all correspondence and other documents exchanged between themselves and their ISP customers, (5) provide copies of all the pleadings they have filed in federal or other state jurisdictions involving reciprocal compensation for ISP traffic, (6) provide copies of all of their correspondence with state commissions on the subject of reciprocal compensation for ISP traffic, and (7) provide copies of all pertinent provisions of any interconnection agreement they have entered into involving reciprocal compensation and switched exchange access traffic.

The Commission affirms the ALJ's ruling on both procedural and substantive grounds. Procedurally, Ameritech Michigan served its discovery questions after the close of business on November 3, 1997, and responses were not due until at least five business days later, the day that Ameritech Michigan was required to file its testimony. Consequently, Ameritech Michigan filed its discovery requests too late to make any use of the responses in preparing its testimony. The ALJ properly refused to relieve the company of the consequences of its decision. In

addition, Ameritech Michigan filed its motion to compel before the responses were due. Its decision to do so necessarily prevented the motion from addressing any claimed deficiencies in the responses that the parties filed on November 10 and 11, 1997. The ALJ could properly deny the motion for that reason as well.

Substantively, the discovery requests are variously overly broad, seek information Ameritech Michigan should seek in another manner (if at all), and are not relevant to the issue in the complaints nor reasonably calculated to lead to the discovery of relevant evidence. The complaints raise the issue of Ameritech Michigan's contractual obligation to pay reciprocal compensation. The discovery at issue does not address that issue. The ALJ therefore properly denied the motion to compel and the related request to adjust the schedule.

On January 16, 1998, Ameritech Michigan filed a request that the Commission take administrative notice of two decisions from an arbitrator in Texas regarding the issue of reciprocal compensation for calls to ISPs in the context of proceedings pending before the Public Utility Commission of Texas. MCI, AT&T, Brooks, MFS, and TCG filed letters in opposition to that request. MFS and TCG also requested that the Commission take administrative notice of a federal District Court decision and two other state commission decisions, respectively.

The Commission denies all three requests. It is open to question whether the Commission may take notice of such matters. Further, no party has argued that the Commission must consider decisions from other jurisdictions in addressing the interconnection agreements at issue.

#### The Terms of the Agreements

The complainants argue that the express terms of the interconnection agreements define

calls to an ISP within the local calling area of the calling party to be local traffic for which reciprocal compensation is required. The agreements provide in part:

Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the Complainant] which a Telephone Exchange Service Customer originates on Ameritech's or [the Complainant's] network for termination on the other Party's network.

TCG Agreement, para. 5.6.1; MFS Agreement, para. 5.8.1; Brooks Agreement, para. 5.7.1; MCI Agreement, para. 4.7.1. The TCG agreement defines local traffic as "local service area calls as defined by the Commission." TCG Agreement, para. 1.43. The other agreements define local traffic as:

[T]hose calls as defined by Ameritech's local calling areas, as described in maps, tariffs, or rate schedules filed with and approved by the Commission as of the date of this Agreement.

MFS Agreement, para. 1.36; Brooks Agreement, para. 1.38; MCI Agreement, Schedule 1.2 (with minor wording variations).

Ameritech Michigan admits that the disputed calls are placed to a telephone number within the local calling area and that it bills its customer for the local call, Exhibit J-1, but Ameritech Michigan argues that the calls do not terminate on the other provider's network. It asserts that the calls instead terminate on the Internet for jurisdictional purposes and are therefore, as a matter of law, not local traffic and, as a matter of contract interpretation, not subject to reciprocal compensation. It asserts that the Federal Communications Commission (FCC) has consistently recognized these calls as exchange access traffic that is within the exclusive jurisdiction of the FCC, although it has exempted these calls from the requirement to pay access charges.

The interconnection agreements define switched exchange access service as follows:

[T]he offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services.

TCG Agreement, para. 1.65; MFS Agreement, para. 1.56; Brooks Agreement, para 1.57; MCI Agreement, sch. 1.2. Reciprocal compensation is not paid for such calls:

The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

TCG Agreement, para. 5.6.2; MFS Agreement, para. 5.8.3; Brooks Agreement, para. 5.7.2; MCI Agreement, para. 4.7.2.

The complainants respond that the calls are indistinguishable from local calls because the calling party uses a local seven-digit telephone number, the call terminates within the local calling area at the ISP's premises associated with that local number, and the caller is billed local charges for the call. Exhibit J-1. Further, they note that Ameritech Michigan treats the calls as local calls for purposes of call rating, billing, reporting, and separations allocations between interstate and intrastate jurisdictions. Exhibit J-1. They argue that a call to an ISP consists of two elements: a circuit switched call (the local call) and one or more packet switched connections to the Internet.

The Commission concludes that the terms of the agreements support the complainants' position. As a service matter, the calls terminate within the local calling area. 3 Tr. 201, 204. The disputed calls are made from one local number to another in the local calling area, and the agreements do not distinguish between calls based on the nature of the customer receiving the